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SUBJECT: GERMAN PROPOSAL TO AMEND AUSTRALIA GROUP GUIDELINES

Classified By: Global Affairs Counselor Donald R. Shemanski,
for reasons 1.4 (b) and (d).

¶1. (C) German MFA Export Control Division Deputy Chief Markus Klinger passed the following two draft proposals and draft annex to Global Affairs officer April 27. Klinger said the German Government proposes to amend the Australia Group (AG) Guidelines "to limit the risks of proliferation and terrorism involving chemical and biological weapons by controlling tangible and intangible transfers that could contribute to CBW activities by states or non state actors." He said the German Government will circulate the two proposals and an accompanying "Best Practices" annex for controlling intangible transfers of technology (ITT) via the Australia Group Information System (AGIS). Germany's goal is for all AG partners to review the proposals and annex, be prepared to discuss them at the June 4-7 AG Plenary in Paris, and adopt them at the Plenary. Klinger mentioned that the proposals and annex being circulated to all MTCR partners, though German-produced, were screened with the EU partners of the AG first. Klinger said the German Government would welcome USG input on the papers, but no later than May 10. Such a deadline would allow Germany to incorporate any input into a revised draft by May 15, which is the latest that any proposals can be submitted for consideration at the Plenary. If Germany receives no input from any partner by May 10, then the drafts will stand as they are for discussion at the Plenary, Klinger said.

¶2. (C/REL MTCR) Begin texts of English-language documents:

Draft as of 19 April 2007

AUSTRALIA GROUP

INTANGIBLE TECHNOLOGY TRANSFER

German Proposal to amend the "AG Guidelines"

The purpose of the AG Guidelines is to limit the risks of proliferation and terrorism involving chemical and biological weapons by controlling all transfers that could contribute to CBW activities by states or non state actors.

The AG control lists provide for the control of intangible transfers of technology (ITT). Technology is defined as "specific information necessary for the development production or use of a product" that may "take the form of technical data or technical assistance". Export is defined as an actual shipment or transmission of AG-controlled items

out of the country which includes transmission of technology by electronic media, fax or telephone. Technical assistance may take forms such as instruction, skills, training, working knowledge, consulting services.

New export channels such as fax and e-mail, along with increased mobility of labour, have made it increasingly easy to transfer AG controlled technology. In the information technology age the control of intangible technology transfers

has become a key challenge to export control and non-proliferation.

To highlight the importance of AG controls on intangible transfer of technology and reflect the fact that the AG Control Lists already provide for ITT, Germany proposes that the AG Guidelines be amended as follows (bold):

11. The purposes of these Guidelines is to limit the risks of proliferation and terrorism involving chemical and biological weapons by controlling tangible and intangible (previous three words are bold) transfers that could contribute to CBW activities by states or non state actors,....

Draft as of 19 April 2007

AUSTRALIA GROUP

INTANGIBLE TECHNOLOGY TRANSFERS

German Proposal
for
Best Practices to implement controls on intangible technology transfers (ITT)

Export controls on intangible transfers of AG-controlled technology are crucial to ensure the credibility and effectiveness of AG export controls. New export channels such as fax and e-mail, along with increased mobility of labour, have made it increasingly easy to transfer AG-controlled technology.

The issue of ITT was first raised in 1999. In 2002 the AG amended the AG Control lists to accommodate ITT. This and the various presentations made at the Joint Session Information Exchange and Enforcement meeting 2006 revealed that all AG members recognize the challenge of ITT and are willing to address and solve the difficulties in designing and enforcing controls.

The purpose of the attached proposal for "Best Practices" is to provide guidance on how to implement effective national controls on intangible transfers of technology. These Best Practices consist of the following key elements:

1I. Government controls on intangible transfers of technology

- 11. Electronic transfers of technology
- 12. Oral and manual transfers of technology

II. Self-auditing by industry, academics and individuals, which requires on the part of governments

- 11. Awareness-raising and outreach programmes to educate and involve industry and academia
- 12. Compliance visits to measure "best practices" and compliance

III. Sanctions

To address the difficulty of devising practical means of enforcing ITT controls, Germany has compiled the Best Practices described in the Annex. These are based on the

discussion over the past couple of years in the AG and at the 2004 Berlin Export Control Seminar on Controls on Intangible Technology Transfer as well as on Germany's own experience.

In the light of the above, Germany proposes the following decision:

Participants agree on the Best Practice Guide described in the Annex as a useful outline to implement ITT controls.
(previous sentence is in italics)

Annex

AUSTRALIA GROUP

Best practice Guide
for Implementing Controls
on Intangible Transfers of AG-Controlled Technology

Introduction

This document presents best practices on how to implement effective controls on intangible transfers of AG-controlled technology. The AG Control lists define technology as "specific information necessary for the development, production or use of a product" that may "take the form of technical data or technical assistance". "Technical data" may take forms such as blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications manuals and instructions written or recorded on other media or devices such as disk, tape or read-only memories.

The AG control lists provide for two distinct situations in which an intangible transfer can occur:

-- First, the transmission of AG-controlled technical data by electronic media (e-mail, the Internet or an intranet etc.), fax or telephone. In this case, the technology is fixed in a tangible medium of expression (hardware such as (previous two words are in italics) read-only memories, disks etc.) before and after the transfer. It is the means of transfer that is intangible.

-- Second, oral transfer of AG-controlled technology through personal exchange or transfer of AG-controlled technology by hand (manual transfer). Such technical assistance may take forms such as instruction, skills, training, working knowledge or consulting services. Here the technology itself is intangible.

Implementation strategy

Successful implementation of controls on intangible transfers of AG-controlled technology involves a three-pronged approach:

I. Government controls on intangible transfers

Government controls require specific strategies with regard to:

- 1. intangible electronic transfers of AG-controlled technology
- 2. oral and manual transfers of AG-controlled technology

II. Self-auditing by exporting industry, academics and individuals

Self-auditing requires that control authorities conduct:

- 1. awareness-raising and outreach programmes to inform and involve industry and academia
- 2. visits to measure "best practices" and compliance with national export controls

III. Sanctions

Sanctions for export control violations require appropriate provisions in criminal law as well as in administrative law.

II. Government controls on intangible transfers

Government controls on intangible transfers require clear laws and regulations on the transmission of controlled technology. To enforce controls, government authorities have various instruments at their disposal prior to, during and after the transfer. Different strategies are required for electronic transfers of technology, on the one hand, and oral and manual transfers of technology, on the other hand. In both areas, difficulties in monitoring the transfer of such know-how highlight the need for less emphasis on checking the transfer itself and a shift towards more emphasis on establishing self-auditing procedures in cooperation with exporters.

1. Electronic transfers of technology (previous sentence is underlined)

a) Export control laws and regulations

Exporters and control authorities must know what constitutes an intangible electronic transfer of controlled technology, which countries and what types of technology are subject to controls, and what exceptions apply.

-- Definition of what constitutes an electronic transfer

Electronic means of transfer include telephone, fax, e-mail, the Internet or an intranet.

-- Specification of the transmitting and the recipient country

Controls will focus on electronic transmission of controlled technology to another country.

-- Specification of the controlled technology

Controls could cover transfers of

- AG-listed technology only, or

- AG-listed technology and non-listed technology in cases where the exporter is aware that the latter items are intended for use in connection with chemical or biological weapons or that the latter items could contribute to CBW activities or was informed by the national authority that the latter items are or may be intended for such an end-use.

-- Exceptions to controls

In line with the AG control lists, laws should specify that technology in the public domain as well as basic scientific research or the minimum information necessary for patent application are not subject to controls.

-- Ensuring coherency of laws and regulations

The overall design of the regulatory environment should facilitate understanding and compliance on the part of industry and academia. To this end, it would be useful to maintain familiar licensing procedures and to widen the scope of existing export controls. One way how electronic transfers of controlled technology could be incorporated into the existing regulatory framework is illustrated by the AG definition of "export". The AG defines export as "an actual shipment or transmission of AG-controlled items out of the country. This includes transmission of technology by electronic media, fax or telephone."

b) Enforcing export controls on electronic transfers

Control authorities have several methods at their disposal to ensure efficient enforcement of controls on electronic transfers.

-- Pre-transfer strategies

Control authorities should exchange information with other countries on suspicious attempts to acquire dual-use chemical or biological manufacturing facilities and equipment. If national law permits, control authorities could monitor specific entities to prevent illegal transfers of controlled technology.

-- Post-transfer controls

By its very nature, the electronic transmission of software and technology, e.g. by downloading data or sending faxes or e-mails abroad, creates considerable scope for illegal transfers. That is why external audits to ensure compliance with export controls as well as criminal investigations to uncover illicit transfers are so important.

- If all transfers that require licenses are documented, this facilitates audits and criminal investigations. Industry, academic institutions and individuals should be obliged to keep certain records of electronic transfers of controlled technology for an appropriate time period (e.g. the last 3 years), in accordance with national legislation and practices. Adapting record-keeping requirements to the different types of licenses reduces the administrative burden on companies and institutions.

- Both external auditing and investigation authorities require highly-trained and specialized staff to develop auditing strategies and investigation techniques designed to detect illegal electronic transfers of controlled technology. Strong IT skills are required to audit and investigate electronic transfers, e.g. by examining server protocols.

Other documents that may provide evidence of illegal intangible transfers include:

- business documents,
- internal communication papers,
- financial transactions, and
- contacts with tangible information recipients prior to and after the respective transfer.

Possible elements of a comprehensive criminal investigation strategy include:

- examination of correspondence and telecommunications based on a strong indication that an illegal act has been committed; fundamental and legal rights must be respected in this connection;
- search warrants and confiscation of items;
- observation;
- exchange of data among public authorities;
- interviews;
- monitoring of financial transactions.

c) Electronic transfers to foreign persons within national borders

In addition, some method of regulating the electronic transfer of controlled technology within national borders should be considered, when the same transfer would require an export license if exported to the country of which the foreign person is a national.

12. Oral and manual transfers of technology

Personal exchange of AG-controlled technology via instruction, skills, training, working knowledge and consulting services as part of scientific or technical cooperation does not necessarily involve tangible sources of information.

a) Export control laws and regulations

Industry, academia and control authorities need to know what constitutes an oral or manual transfer of controlled technology, which transmitters and recipients and what types of technology are subject to control, as well as what exceptions apply.

-- Definition of what constitutes an oral or manual transfer of technology

Oral and manual transfers of technology involve the personal exchange of instruction, skills, training, working knowledge and consulting services as part of scientific or technical cooperation. Here the technology is intangible: Know-how is carried in peoples' minds rather than in a tangible medium of expression.

-- Specification of the transmitter and recipient
Controls on oral and manual transfers of technology may cover, in a manner consistent with national laws and practices, two distinct situations:

- a national goes abroad to provide know-how (technology) to a foreigner and/or
- a person on national territory provides know-how (technology) to a foreigner.

-- Specification of controlled technology
Controls may cover transfers of

- AG-listed technology only, or
- AG-listed technology and non-listed technology in cases where the exporter is aware that the latter items are intended for use in connection with chemical or biological weapons or that the latter items could contribute to CBW activities or was informed by the national authority that the latter items are or may be intended for such an end-use.

-- Exceptions to controls

In addition, national laws and regulations should specifically state what is excepted from controls on oral and manual transfers of technology (e.g. technology in the public domain, basic scientific research).

b) Enforcing export controls on oral and manual transfers

-- Pre-transfer strategies

Control authorities should exchange information with other countries on suspicious attempts to acquire dual-use chemical or biological manufacturing facilities and equipment. As to oral transfers of controlled technology (not information in the public domain or basic scientific research) on national territory, the screening of visas may be a useful instrument for preventing proliferation.

- Countries may seek to use existing visa screening procedures to prevent proliferation. One objective could be to establish whether there is any link between specific visa applications and certain sensitive CBW activities. Special care could be taken when screening visa applications from graduate students and scientists in sensitive disciplines. Visa-issuing authorities could require comprehensive information from applicants and apply a risk profile based on nationality (countries with programmes of concern) or possible links to CBW-related business and industry.

- Authorities could be encouraged to exchange information on, and obtained through, current visa screening practices (trends, suspect persons and institutions, etc.).

--Controls on transfers as such, post-transfer controls
Whenever oral or manual transfers of controlled technology do not involve tangible sources of information, enforcing controls on the transfer as such and post-transfer monitoring becomes difficult. However, oral or manual transfers of controlled technology will often go hand in hand with tangible exports of controlled technology. Scientists, designers, engineers and other persons involved will take tangible sources of technology abroad to back up the transfer of personal know-how.

Due to the nature of electronic, oral and manual transfers of technology, there are no border controls to prevent the transfer of information itself. The strategies for government controls outlined above therefore highlight the need for the collaboration of the export industry, academics and individuals. There should be less emphasis on policing and checking the actual transfer and a shift towards more emphasis on building confidence and establishing self-auditing procedures in cooperation with exporters.

II. Self-auditing by industry, academia and individuals

Consequently, the second key element to successful implementation of controls on intangible transfers of

AG-controlled technology is self-auditing by industry, academia and individuals. On the part of control authorities, this requires (1.) awareness-raising and outreach programmes to inform and involve industry and academia, and (2.) visits to measure "best practices" and compliance with export controls.

11. Awareness-raising and outreach programmes to inform and involve industry and academia
(previous sentence is underlined)

Awareness-raising and outreach programmes for industry and academia are particularly important for preventing illicit electronic, oral and manual transfers of controlled technology (Footnote 1).

-- As a first step, industry and academia should be informed about the new controls. One way would be to send out newsletters, leaflets or bulletins to relevant target groups. Internet postings, regulatory manuals, articles in relevant journals, publications and seminars can also promote awareness and help industry and academia to comply with the regulations on intangible transfers. The success of these measures depends on the accurate targeting of industry, academic institutions and individuals in possession of the relevant technology. Experience suggests that the target group for electronic and oral transfers is broad: it includes engineers, designers and individual scientists -- all of whom arguably did not need to be aware of export controls in the past. Awareness-raising campaigns should take into account, moreover, the different awareness levels and information needs of industry and academia. While companies will to some extent be familiar with export controls on transfers of technology, research facilities are only rarely aware of their responsibility to prevent proliferation and terrorism involving chemical and biological weapons.

-- By providing expertise and advice to industry and academic institutions on how to design and implement internal compliance programmes, governments can help reduce the burden on their export control authorities. In most cases, companies and academic institutions also have an interest in ensuring that sensitive items are not inadvertently supplied for use in CBW activities -- not to mention industry's proprietary interest in denying sensitive information to competitors. The work of export control officers in industry and academic institutions is crucial in providing target groups with easy access to all relevant information and advice on intangible transfers.

12. Conducting visits to measure "best practices" and compliance
(previous sentence is underlined)

Regular auditing of internal compliance programmes by export control authorities helps to promote "best practices" and to measure compliance with controls on electronic, oral and manual transfers of controlled technology. Entities should be required to demonstrate the effectiveness of their internal compliance programmes.

To do so, entities should:

- be familiar with export control legislation and precisely classify all the listed items they deal with;
- have a system in place to ensure that all staff are aware of the export control issue and adhere to the required procedure for making a transfer of controlled technology;
- assign clear responsibilities for export controls (preferably involving senior staff) and
- have a system in place to ensure that licenses cover all relevant transfers of technology.

Export control authorities' awareness-raising and training efforts should focus on entities that are found to be significantly lacking in compliance.

III. Sanctions

The third key element to successful implementation of controls on intangible transfers is the credible threat of

sanctions for non-compliance. For such controls to be effective, violations must be investigated and prosecuted. To do so, control authorities must be prepared to invest the necessary resources.

Different types of sanctions provide appropriate incentives for compliance with controls on intangible transfers:

Criminal law should target individuals and entities that make, or aid and abet anyone in making, illicit transfers of technology. Criminal sanctions should comprise prison sentences and fines for individual offenders, as well as fines for companies and other entities.

At administrative level export control authorities may additionally

- require the exporter to take all necessary actions to ensure future compliance (e.g. establish an effective internal compliance programme) and/or
- deny export licenses to non-complying exporters.

Footnote 1: See "Australia Group Awareness-Raising Guide"

End texts of English-language documents.
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